DOCKET

(4)

PROCEEDINGS AND ORDERS DATE: 101884

CASE NBR 83-1-01755 CFX
SHORT TITLE Bhd. of Teamsters Local 70 DOCKETED: Apr 11 1984
VERSUS CA Consolidators, Inc.

Date	Proceedings and Orders
Apr 11 1984	Petition for writ of certiorari filed.
Jun 5 1984	DISTRIBUTED. September 24, 1984
Jul 12 1984	Response requested.
Aug 13 1984	Brief of respondent CA Consolidators, Inc. in opposition filed.
Oct 1 1984	REDISTRIBUTED. October 5, 1984
Oct 9 1984	Petition DENIED. Dissenting opinion by Justice White with whom Justice O'Connor joins. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

83 - 1755

No.

Office - Supreme Court, U.S.
FILED
APR 11 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

BROTHERHOOD OF TEAMSTERS, LOCAL No. 70,
Petitioner,

vs.

CALIFORNIA CONSOLIDATORS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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4PP

Question Presented

Whether a District Court has jurisdiction to determine that a corporation is bound to a written collective bargaining agreement where a union alleges that that entity is bound by virtue of being an alter ego or a joint employer with another employer concededly bound to the collective bargaining agreement under the authority of 19 U.S.C. Section 185 which provides that district courts may enforce collective bargaining agreements?

Parties Below and Affiliates of Petitioner

Pursuant to Supreme Court Rule 28.1, Petitioner states that its parent organization is the International Brotherhood of Teamsters, Chauffeurs, Warehousmen & Helpers of America.

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No.

In the Supreme Court

of the

United States

October Term, 1983

Brotherhood of Teamsters, Local No. 70,

Petitioner,

vs.

California Consolidators, Inc.,

Respondent.

Petition For Writ of Certiorari To The

United States Court of Appeals For The

Ninth Circuit

Brotherhood of Teamsters, Local No. 70 (hereinafter "Local 70") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding.

I

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 693 F.2d 81. That Court's order denying Petitioner's petition for rehearing is reprinted as Appendix B.

II

JURSIDICTION

The opinion of the Court of Appeals of the Ninth Circuit was entered on November 2, 1982. A timely petition for rehearing was filed on November 16, 1982. The

Court entered its order denying rehearing on Janaury 12, 1984. The jursidiction of this Court is envoked under 28 U.S.C. Section 1254 (1). This petition is timely filed with this Court under 28 U.S.C. Section 2101 (c).

III

STATUTORY PROVISIONS

The relevant statutory provision is 29 U.S.C. Section 185 which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

IV

STATEMENT OF THE CASE

The District Court dismissed Local 70's Complaint for Declaratory Relief which sought a determination that California Consolidators, Inc. was a party to a collective bargaining agreemeent known as National Master Freight Agreement (App. C). Local 70 claimed that California Consolidators was party to this agreement because it is "a joint employer, alter ego, single integrated enterprise and/or one and the same company as Marathon Delivery Service, which is and admits to being bound to the aforesaid mentioned Collective Bargaining Agreement" (App. C, p.3). These concepts are well established in labor law and provide that certain entities may be bound to a

collective bargaining agreement by virtue of their relationship to other entities which have executed a written collective bargaining agreement with a labor organization.

In an answer California Consolidators denied the allegation of its relationship to Marathon Delivery Service but conceded that Marathon was a party to the National Master Freight Agreement. (Appendix D).

California Consolidators brought a motion to dismiss under Rule 12(b)(6) on the theory that the District Court lacked jurisdiction to determine the relationship alleged by Local 70 since that would be within the exclusive jurisdiction of the National Labor Relations Board, under 29 U.S.C. Section 159. The District Court granted that

motion to dismiss and that judgment was appealed.

The Court below reversed the ruling that the District Court could not determine the relationship between California Consolidators and Marathon Delivery Service, Inc. but held that the Court could not determine that California Consolidators was actually bound to the Marathon collective bargaining agreement because that would involve the determination of the "appropriate bargaining unit", which the Court held was reserved exclusively for the National Labor Relations Board.

V
REASONS WHY THIS WRIT SHOULD BE GRANTED

Employers have developed a sophisticated method for avoiding collective bargaining agreements by establishing separate

entites which are nonunion. Commonly known as "double breasted" operations, these efforts have become commonplace in industrial relations, particularly in the construction industry but increasingly in other areas including the trucking industry.

Often such disputes are litigated before the National Labor Relations Board on a claim that the establishment of the second entity is a violation of an employer's duty to bargain in good faith because it effectively repudiates the collective bargaining agreement between an employer and the union. See NLRB vs. Don Burgess Construction Corp., 596 F.2d 378 (9th Cir. 1979), cert. den., 444 U.S. 940 (1979) and N. J. Tanaka Construction, Inc. vs. NLRB, 675 F2d.

1029 (9th Cir. 1982)./1 In those cases the traditional remedy has been to require the second entity to be bound to the collective bargaining agreement and to pay appropriate contractual damages.

These issues have also been litigated in the arbitration context where courts have either compelled arbitration of these disputes, or confirmed arbitration awards finding a violation of the collective bargaining

/1 For purposes of this petition, we need not discuss the distinctions between the alter ego, joint employer or single integrated enterprise concepts. They all result in the same conclusion that one entity has such a relationship with another entity so as to make it bound to that second entity's collective bargaining agreement. See, in general, Morris, The Developing Labor Law, 2d ed. pp. 735-40 and 1440-145 (BNA 1983).

agreement. See Local No. 6, Bricklayers vs. Boyd G. Heminger, Inc., 483 F.2d 129 (6th Cir. 1973) (compelling arbitration) and Carpenters 46 Northern California Counties Conference Board v. Zweigle, 130 Cal.App.3d 337 (1982) (confirming arbitration). Similarly such issues have been litigated where trust funds or unions seek to collect contributions from second entities under the alter ego or joint employer theories. See Seymour v. Hull & Moreland Engineering, 605 F.2d. 1105 (9th Cir. 1979) and Metropolitan Detroit Bricklayers District Council v. Hoetger & Co., 672 F.2d 580 (6th Cir. 1982). and the relationship between entities has been litigated in successorship cases. See Howard Johnson Co. v. Detroit Local

Joint Executive Board, 417 U.S. 249 (1974) and General Teamsters Local 249 v. Bil's Trucking, Inc., 493 F.2d 956 (3rd Cir. 1974). In each of these cases moreover the courts have noted that such determinations may not be made where they would conflict with a final decision of the National Labor Relations Board to the contrary relying upon Carey v. Westinghouse Electric Corporation, 375 U.S. 261 (1974). Cf. Local 204, IBEW v. Iowa Electric Light, 668 F.2d 413 (8th Cir. 1982).

This case presents the variant where rather than proceed through arbitration or the Labor Board, the union invokes the jurisdiction of the district court under Section 185 to enforce the written agreement by determining the alter ego or joint employer

relationship. Section 185 has been routinely granted a broad application by this Court where parties seek to enforce collective bargaining agreements not withstanding concurrent jurisdiction in the Labor Board to determine the same issue. See Vaca v. Sipes, 385 U.S. 895 (1967), William E. Arnold Co. v. Carpenters District Council, 417 U.S. 12 (1974); Carey v. Westinghouse Electric Corporation, supra; Howard Johnson Co. v. Detroit Council Joint Executive Board, supra; and Cf. Kaiser Steel Corp. v. Mullins,, 455 U.S. 72 (1982).

In invoking Section 185 the Union sought to have the court make what is essentially an alter ego determination, a determination which the district courts are well suited to perform. See Piercing the Corporate Law Veil, the

Alter Ego Doctrine Under Federal Law, 95 Harv.Law R. 853 (1982). The court below recognized this and held that the district court under Section 185 could determine the relationship between the entities but that the court could not make the ultimate determination that the entities were bound the same contract because of the necessity of finding an "appropriate bargaining unit", a determination which the court felt was exclusively within the jurisdiction of the National Labor Relations Board.

We note however that such issues have routinely been resolved by courts in the context of other Section 185 adjudications. See Howard Johnson Co v. Detroit Joint Executive Board, supra, and more recently in pre-hire contract litigation. See Jim McNeff,

Inc. v. Todd, -U.S.- (1980) and Roberts v. Ayala, 709 F.2d 520 (9th Cir. 1983).

The decision of the court below conflicts squarely with the decision of the Fifth Circuit issued two days later, Carpenters Local 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982), cert. den., -U.S.- (1983). In an expansive decision, the court held that a district court could make the determination that two entities were bound to the contract under the theories advanced in this case. Moreover it appears to be consistent with the decision of other circuits in related circumstances where the same relationships have been litigated. See Teamsters Local 89 v. Public Service Company, 705 F.2d 239 (7th Cir. 1983);

Carpenters District Council v. Kessel, 487 F.Supp. 54 (W.D. Pa 1980); and cases cited supra. Cf. Kaylor v. Crown Zellerbach, 643 F.2d 1363 (9th Cir. 1981) (making alter ego determination in duty of fair representation action)

Because of the explosive use of the "double breasted" scheme, the importance of this issue cannot be understated. As unions attempt to defeat the establishment of such entities, they will resort to the Labor Board, the arbitration process, as well as Section 185 suits. It is only the Ninth Circuit which has prohibited the use of such device although the district court makes the alter ego determination, the ultimate determination of the existence of the collective bargaining agreement is left unresolved.

VI

CONCLUSION

The use of the district court's power under Section 185 to determine the relationship between two entities and their requirements to be bound to a collective bargaining agreement is one of extreme importance. The conflict with the Fifth Circuit's decision in Pratt Farnsworth compels the granting of this petition for writ of certiorari.

Dated: April 6, 1984

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

FILED
NOV 2 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

BROTHERHOOD OF TEAMSTERS, LOCAL NO. 70,	No. 81-4292
Plaintiff-Appellant,	DC# C-80-4913MHP
vs.	OPINION
CALIFORNIA CONSOLIDATORS, INC.	
Defendant-Appellee.	

Appeal from the United States
District Court for the Northern District
of California
District Judge Marilyn Hall Patel, Presiding

((Argued and Submitted May 14, 1982))

Before: BROWNING, Chief Judge, SWYGERT* and WRIGHT, Circuit Judges.

PER CURIAM:

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*Of the Seventh Circuit

Local 70 wants to represent the employees at California Consolidators, Inc. To that end, on November 17, 1980, it filed a complaint against Consolidators under section 301(a). It alleged that Consolidators and Marathon Delivery Services constituted a single employer and sought a declar[illegible]y judgment that Consolidators was bou[illegible] by the union's collective bargaining agreement with Marathon .

Consolidators is a trucking firm engaged in handling, warehousing, and shipping containerized cargo. It was formed in Los Angeles in 1976 and expanded to open a facility in Oakland in 1978. Employees at neither location are represented by Local 70 or any other union.

Marathon is a pool car distributor and conducts local and long distance drayage. It has operated in Oakland for about 2 years and in Los Angeles since about 1975. Local 70 and Marathon have maintained a collective bargaining relationship for many years.

The company filed a motion for summary judgment. It alleged, among other things, that the court lacked jurisdiction because the National Labor Relations Board commands exclusive jurisdiction over the single employer issue. The district court declined to consider any factual matters and treated the motion as one to dismiss, which it granted.

We must decide whether the district court determined correctly that it lacked jurisdiction to adjudicate the

complaint. Our review begins by recognizing the congressional division of responsibility in questions of national labor law and policy between the executive branch, represented by the National Labor Relations Board, and the judiciary.

The Supreme Court examined that allocation in South Prairie Construction Co. v. Local 627, International Union of Operating Engineers, 425 U.S. 800 (1976) (per curiam). The Board had determined that South Prairie and Kiewit were not single employers, precluding application of the union contract with Kiewit to the employees of South Prairie. The court of appeals reversed, holding that the companies should be considered a single employer. It went on to conclude that the combined work force

constituted an appropriate bargaining unit.

The Supreme Court condoned the lower court's determination of the single employer issue, but reversed the assertion of jurisdiction to decide whether the employees of both companies constituted an appropriate bargaining unit. By deciding the unit question in the first instance, the court had intruded upon the primary competence of the Board for deciding the appropriateness of bargaining units.

Congress in Section 9 of the National Labor Relations Act entrusted the appropriateness question to the Board. 29 U.S.C. Section 159. It gave the Courts of Appeals the duty to review the Board's conclusions. The South Prairie Court explained:

> In foreclosing the Board from the opportunity to determine the appropriate bargaining unit under Section 9, the Court of Appeals did not give "due observance ((to)) the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 141 (1940).

425 U.S. at 806. See also Computer Sciences Corp. v. NLRB, 677 F.2d 804, 808 n.7 (11th Cir. 1982) (South Prairie commands a "proper observance of the congressional allocation of authority").

We recently applied that principle to a Section 301 action in Local 3-193 International Woodworkers v. Ketchikan Pulp Co., 611 F.2d 1925 (9th Cir. 1980). There we recognized:

> Congress did not intend by enacting Section 301 to vest in the courts initial authority to consider and pass upon questions of representation and determination of appropriate bargaining units.

611 F. 2d at 1301.1/

The most relevant aspect of South Prairie is its necessary implication that single employer questions comprise two subsidiary issues. 425 U.S. at 804. In NLRB v. Don Burgess Construction Corp., 596 F.2d 378 (9th Cir.), cert. denied, 444 U.S. 940 (1979), we explained the extent of the division:

> ((T))hat two companies have been designated a single employer ., . . is not determinative as to whether both are bound by a union contract signed by one of them. This requires that the employees

of each constitute a single bargaining unit.

596 F.2d at 386.

A district court may decide under Section 301 whether two companies constitute a single employer. Metropolitan Detroit Bricklayers District Council, International Union of Bricklayers v. J. E. Hoetger & Co., 672 F.2d 580, 583 (6th Cir. 1982.2/ But a single employer conclusion fails to determine that the employees form a single or an appropriate bargaining unit. NLRB v. Don Burgess Construction Corp., 596 F.2d at 386; accord Road Sprinkler Fitters Local 669 v. NLRB, 676 F. 2d 826, 830 (D.C. Cir. 1982); NLRB v. Big Bear Supermarkets No. 3, 640 F.2d 924, 931 n.7 (9th Cir.), cert. denied, 449 U.S. 919 (1980).

While Section 301 grants the district court jurisdiction to decide whether employers constitute a single employer, we conclude that it does not extend to the determination of the second part of the issue, the appropriateness of the bargaining unit.3/ The district court properly concluded that it had no jurisdiction to decide the precise issue framed by the union's complaint.4/

Local 70 sought a declaration that Consolidators was bound to the collective bargaining agreement signed by Marathon, not merely that the companies constituted a single employer. If the complaint had stated an actual controversy and requested declaratory relief that the companies were a single employer, the court would have had jurisdiction to determine it. Instead, it

sought relief that would require the court to decide the appropriateness of a bargaining unit, a representational question reserved in the first instance to the Board.5/

It appears the district court believed it also had no jurisdiction over any part of the single employer issue. Consequently, we remand for further proceedings including an evidentiary hearing on this issue. If so requested the plaintiff should be permitted to amend its complaint.

REMANDED.

FOOTNOTES

1/ In Ketchikan Pulp, the union and the company agreed to a contract provision stating that the union would be the sole collective bargaining agent for the company's employees. At the time, the company conducted only one logging operation. During the life of the contract the employer acquired several other logging sites, which were georaphically distinct, interchanged no employees, and opeated autonomously by subsidiary corporations.

The employer refused to recognize the union as the representative of its employees at its other sites. The union sued under Section 301 seeking a declaration that it represented these employees.

We refused to permit the union to use Section 301 for representation purposes, stating:

> In the present case the Union is attempting an end run around Section 9 of the Act and under the guise of contract interpretation wants to avoid self-determination of a bargaining agent by a substantial number of employees and determination of an appropriate bargaining unit by the

> NLRB, which has primary authority in this area. This cannot be countenanced.

611 F.2d at 1299-1300. Nevertheless, we concluded that the court had jurisdiction to construe the contested contract clause because its "sole operative effect" affected neither representation nor the determination of an appropriate unit. See id. at 1301.

2/ In J. E. Hoetger & Co., the union sued a general contractor under Section 301 for payment of fringe benefits left unpaid by a bankrupt subcontractor, alleging that they were joint employers. The court noted that Section 301 generally creates jurisdiction only over signatories to a contract, but concluded that, "since the primary issue in this case was whether ((the general contractor)) was a 'joint employer' such that it could be bound by the collective bargaining agreement, . . . the district court had jurisdiction." 672 F.2d at 583.

Deciding whether the general contractor should be held responsible for fringe benefits owed by its subcontractor required the district court to decide neither the appropriateness of a unit nor any other question of representation. Its consideration of the joint employer question did not threaten to invade the Board's area of expertise.

3/ Sound policy reasons counsel against initial determination of unit questions by the courts. Most significant among them is to avoid the potential for creating a "tangled mass of judicial and administrative conflict." Local 204, International Brotherhood of Electrical Workers v. Iowa Electric Light & Power Co., 668 F.2d 413, 419 (8th Cir. 1982).

In Computer Sciences Corp. v. NLRB, 677 F.2d 804, 808 (11th Cir. 1982), the court refused to decide in contempt proceedings that a unit remained appropriate after a change in employers. Its reasoning is equally applicable to the district courts' consideration of unit questions. The court wrote:

> We are concerned that allowing initial court determination of unit questions . . . would set courts . . . on a course of developing their own standards for unit appropriateness -- standards which might reflect judgments figfering from those of the agency with expertise in labor matters. Just as it is important that the Board itself maintain a consistent approach in its unit determinations,

> we think it important to avoid divergent administrative and judicial standards for such determinations.

677 F.2d at 808 (citation omitted).

4/ We would reach the same result under the test advocated by the Eighth Circuit in Local 204, International Brotherhood of Electrical Workers v. Iowa Electric Light & Power Co., 668 F.2d 413 (8th Cir. 1982), in which the court concluded:

> We believe the appropriate line between those cases where the district court has jurisdiction under section 301 and those in which it does not is to be determined by examining the major issues to be decided as to whether they can be characterised as primarily representational or primarily contractual.

Id. at 419 (citing Cappa v. Wiseman, 659 F.2d 957 (9th Cir. 1981).

Local 204 had been certified as the bargaining representative for a unit of quality control inspectors at a nuclear power plant. It sued under

Section 301 for breach of contract after the employer contended the employees were supervisory personnel and refusd to bargain.

The Court reversed the district court's assertion of jurisdiction. Although the Board already had determined the appropriate unit question, the district court had no jurisdiction because the case was but a "poorly veiled attempt to obtain direct review of a representational matter by invoking section 301 contract jurisdiction." 668 F.2d at 420.

Although Iowa Electric presents issues different from those on appeal here, were we to apply its test, we would find the single employer question to be primarily contractual and subject to district court jurisdiction. But the unit determination necessary for declaring the nonsignatory employer bound by a collective bargaining agreement remains primarily representational, thereby outside the appropriate jursidiction of the district court.

Nor does Cappa vs. Wiseman, 659 F.2d 957 (9th Cir. 1981) cited, by Iowa Electric, provide additional guidance. There, we were concerned with the admissibility of an oral agreement concerning the scope of a bargainig unit.

Because the power of the parties to limit the appliction of their collective bargaining agreement is a procedural qustion not involving the substantive

decision whether a bargaining unit is appropriate, we determined that "the appropriateness of the bargaining units, in the sense that the NLRB determines it, is not an issue . . .." Id. at 959. See Metropolitan Detroit Bricklayers District Council, International Unin of Bricklayers v. J. E. Hoetger & Co., 672 F.2d 580 (6th Cir. 1982). We concluded that "court determination of the issue does not conflict with our previous holding that issues of representation and appropriateness of bargaining units are within the primary jurisdiction of the NLRB." 659 F.2d at 960 (citing Ketchikan Pulp).

5/ In Local 59, International Brotherhood of Electrical Workers v. Namco Electric,Inc., 653 F.2d 143 (5th Cir. 1981), the district court dismissed the union's Section 301 action in which it sought to bind a nonsignatory employer to a collective bargaining agreement alleging it to be the alter ego of the signatory. The Fifth Circuit affirmed, but did so on the basis that the companies were not alter egos.

Although Namco Electric purportedly declined to decide the scope of district court jurisdiction, 653 F.2d at 146, its result is not inconsistent with our holding here. We have concluded that a court may decide under Section 301 the first portion of the single employer question (and of joint employer or alter ego questions as well) without intruding upon the province of the Board. Only the

additional finding necessary to conclude that a contract is binding because the companies constitute a single employer is beyond the court's appropriate jurisdiction. The Namco Electric court's determination of the alter ego question extended no further.

APPENDIX B

FILED
JAN 12 1984
PHILLIP B. WINBERRY
CLERK,U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brotherhood of TEAMSTERS, LOCAL NO. 70,	)	
Plaintiff-Appellant,	)	NO. 81-4292 DC# C-80-4213MHP
vs.	)	
CALIFORNIA CONSOLIDATORS, INC.,	)	
Defendant-Appellee.	)	

Before: BROWNING, SWYGERT*, and WRIGHT, Circuit Judges.

The petition for rehearing has been considered and is denied. The petitioner has withdrawn its suggestion for hearing en banc.

---

* United States Senior Circuit Judge for the Seventh Circuit.

APPENDIX C

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ORIGINAL
FILED

NOV 17 1980

WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BROTHERHOOD OF TEAMSTERS, LOCAL NO. 70, Plaintiff, v. CALIFORNIA CONSOLIDATORS, INC., Defendant.	)	No. C 80 4213 ACW COMPLAINT FOR DECLARATORY RELIEF

Plaintiff complains of Defendant as follows:

I.

Jurisdiction of this Court is based upon 29 U.S.C. Section 185, 28 U.S.C. Sections 2201 and 2202 and 28 U.S.C. Section 1337.

II.

Plaintiff, Brotherhood of Teamsters Local No. 70 is a labor organization within the meaning of 29 U.S.C. Section 152.

III.

Defendant, California Consolidators, Inc., is a California corporation and an employer within the meaning of 29 U.S.C. Section 152.

IV.

At all times herein relevant

Defendant, California Consolidators, Inc., has had its principal place of business in Oakland,California, and does business as a trucking firm.

V.

At all times herein relevant Plaintiff has contended that California Consolidators, Inc., is bound to a Collective Bargaining Agreement known as the National Master Freight Agreement and the Joint Council No. 7 Supplement for the period 1979 through 1982. Plaintiff makes this contention because it alleges that California Consolidators, Inc., is a joint employer, alter ego, single integrated enterprise and/or one and the same compnayi as Marathon Delivery Service, which is and admits to being bound to the aforesaid mentioned Collective Bargaining Agreement.

VI.

Defendant denies it is bound to the Collective Bargaining Agreement mentioned above.

VII.

Plaintiff has no adequate remedy of law other than by way of this Complaint for Declaratory Relief that California Consoidators, Inc., is bound to the National Master Freight Agreement and the Joint Council No. 7 Supplement.

WHEREFORE, Plaintiff prays that this Court issue a judgme. c declaring that California Consolidators, Inc., is bound to the National Master Freight Agreement and the Joint Council No. 7 Supplement between it and Brotherhood of Teamsters Local No. 70; for costs of suit and for attorenys' fees and for such other and further relief as to this Court

seem just and proper.

DATED: Nov. 6, 19[redacted]

Respectfu[redacted]ubmitted,

VAN BOURG, [redacted]LEN, WEINBERG & ROGER

By: S/
DAVID A. ROSENFELD
Attorneys for Plaintiff
BROTHERHOOD OF TEAMSTERS, LOCAL NO. 70

APPENDIX D

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BROTHERHOD OF TEAMSTERS, LOCAL NO. 70., Plaintiff, vs. CALIFORNIA CONSOLIDATORS, INC., Defendant.	)	Case No. C-80-4213 ACW ANSWER TO COMPLAINT FOR DECLARATORY RELIEF

Defendant CALIFORNIA CONSOLIDATORS, INC., answers the Complait in the above-captioned action as follows:

1. In answer to Paragraph I, Defendant admits that Plaintiff invokes

the Court's jurisdiction under 29 U.S.C. Section 185, 28 U.S.C. Section 2201 and 28 U.S.C. Section 1337. Defendant denies that these statutes confer jurisdiction on this Court.

2. Defendant admits the allegations of Paragraph II.

3. Defendant admits the allegations of Paragraph III.

4. Defendant admits the allegations of Paragraph IV.

5. In answer to Pararaph V, Defendant denies that it is bound to a collective bargaining agreement known as the National Master Freight Agreement and the Joint Council No. 7 Supplement for the years 1979 and through 1982. Defendant further denies that it is a joint employer, alter ego, a single integrated enterprise and/or one and the

same company as Marathon Delivery Service. Defendant is informed and believes that Marathon Delivery Service is a party to the above-referenced National Master Freight Agreement.

6. Defendant admits the allegations of Paragraph VI.

7. Defendant denies the allegations of Paragraph VII.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFNSE

The Court lacks subject matter jurisdiction over the action. Jurisdiction over the subject matter of Plaintiff's Complaint lies exclusively with the National Labor Relations Board.

THIRD AFIRMATIVE DEFENSE

Plaintiff's claim is barred by

res judicata or collateral estoppel. Plaintiff's contensions in this action are substantially identical to those raised by Plaintiff against Marathon Delivery Service in an aribitration hearing before the Joint Committee No. 7 or Local Operations ("Joint Committee"), a body empowered under the applicable collective bargaining agreement to finally resolve disputes arising under the agreement. On May 14, 1980, the Joint Committee heard and denied Plaintiff's claim.

WHEREFORE, DEFENDANT prays:

1. That Plaintiff take nothing by its Complaint;

2. For reasonable attorneys' fees;

3. For costs of suit herein;

4. For such other and further relief as the Court may deem proper.

DATED: December 18, 1980

SPECTER, STEVENS & CARTER
JAMES A. CARTER

By S/_____

Attorneys for Defendant
CALIFORNIA CONSOLIDATORS, INC.

RESPONDENT'S

BRIEF

Office-Supreme Court, U.S.
FILED
AUG 13 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1755

In the Supreme Court

of the

United States

October Term, 1983

Brotherhood of Teamsters,
Local No. 70,

Petitioner,

vs.

California Consolidators, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Attorneys for Respondent

STATEMENT

The relevant facts are succinctly set forth in the Court of Appeals Opinion. In substance, the union has a contract with Marathon, and it wishes to impose that same contract on Consolidators, without permitting its employees to exercise any voice in whether they wish to be represented by the union. The union could have petitioned for an election before the NLRB; claimed that Consolidators was an accretion to its bargaining unit with Marathon, and sought an NLRB order applying the Marathon contract to Consolidators; filed a unit clarification petition before the NLRB; or filed unfair labor practice charges against Marathon,

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Pursuant to Rule 28.1, Respondent states that it has no parent, affiliated, or subsidiary corporations.

contending that its failure to apply the Marathon contract to the Consolidators' employees was an unfair labor practice. In short, there were numerous routes the union could have followed before the NLRB; and if its position had merit, it must be presumed that the NLRB would have provided an appropriate remedy to the union.

The union elected not to file timely proceeding with the NLRB, but after the 10(b) limitation period, filed a grievance which was denied by the Joint Committee. After the authorized period for filing suit to vacate said award, the union filed a complaint in the United States District Court, basing jurisdiction on 29 U.S.C. §1985, and sought to have the federal court impose the Marathon contract on the employees of Consolidators. The Court

of Appeals, relying upon this Court's decision in South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers (Peter Kiewit), 425 U.S. 800 (1976), and applying earlier authority from the Ninth Circuit, refused to permit the District Court to decide the representation issue which was essential to the remedy sought by the union.

The union now seeks certiorari in this Court, asking the Court to determine that unions may, following expiration of the statute of limitations applicable to NLRB proceedings, file suits in federal court for the purpose of imposing a contract on a non-signatory employer. This resort to federal court, with concommitant avoidance of the statute of limitation applicable before the NLRB and deprivation of NLRB

protection for the employees of the non-signatory, is necessary, the Petitioner would have this Court believe, because the NLRB is not capable of protecting unions from an employer which has separate union and non-union operations.

Petitioner does not candidly state why it believes the federal courts, which are already overwhelmed with litigation, should now be required to make their resources available to unions to the detriment of all other litigants, nor does the union, in its Petition, indicate why the union would prefer to spend its members' dues in paying attorneys to prosecute litigation in federal court rather than utilizing the administrative processes of the NLRB, which are provided without cost to the union. Assuming, arguendo,

that a union or its legal counsel believes the union's case against a "double-breasted" employer has merit, there is simply no logical reason why a union would elect to suffer the expense and delay associated with federal court litigation when the union has alternatives such as the NLRB and arbitration, both of which are far cheaper and far more expeditious.

Merely posing the foregoing suggests the answer: A union would only engage in 301 litigation where it knew it could not prevail before the NLRB or an arbitrator. In this case, Petitioner failed to file with the NLRB within the six-month period required by 10(b), and lost a grievance under the contract. Electing to try a forum which would permit it to avoid those obstacles, it filed under 301.

REASONS FOR DENYING THE PETITION

A. THE QUESTION DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioner asserts that the decision of the court below conflicts squarely with the decision of the Fifth Circuit in Carpenters Local 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982); cert. denied, ___U.S. ___, (1983). We note that a similar argument was made before this Court in the Petition filed in the Pratt-Farnsworth case, and call the Court's attention to the Brief for Respondents in Opposition, page 7, where counsel for the union in that case distinguished the decisions, and asserted to this Court in opposing certiorari that there was no conflict between the two decisions.

Notwithstanding the foregoing, and assuming, arguendo, that

there is a conflict in the Circuits, the Court should not grant the petition in this case for reasons discussed below.

B. THE 301 ISSUES SHOULD BE DECIDED CONCURRENTLY WITH ERISA

(i) This Court should grant certiorari to determine whether federal District Courts may properly determine representation issues under Section 301, at the same time it grants certiorari to determine the identical issue under ERISA, 29 U.S.C. §1132. If this Court determines those jurisdictional questions piecemeal, by granting certiorari under 301 in a case which does not present the concurrent ERISA issue, in numerous cases counsel to labor unions and trust funds established under union contracts will utilize the trust funds as plaintiffs in suits grounding jurisdiction on ERISA while the 301 issue is

pending. Although it would be possible for the Court to resolve the issues simultaneously by granting the petition in this case to resolve the 301 jurisdiction questions and granting a petition in a different case to resolve ERISA jurisdiction questions, it is submitted that judicial efficiency and economy would better be served by resolving both issues in the same case.

(ii) If the Court should grant certiorari and affirm the Ninth Circuit, holding that representation issues may not be litigated under Section 301, while leaving open the courts' ERISA jurisdiction to decide representation issues, then virtually all constructions Unions can be expected to persuade the trustees of jointly administered trust funds to utilize ERISA lawsuits to test single-employ-

er and representation issues. ERISA lawsuits have several advantages to a union: First, a union is not required to use its dues income to prosecute such lawsuits, thereby permitting the union to use its resources for other purposes. Second, if the suit is prosecuted by the trust funds under ERISA and the trust funds prevail, they are entitled to an attorneys' fees award from the employer. There is no such attorneys' fees provision under Section 301. If the trust fund loses the lawsuit and the employer is awarded attorneys' fees under ERISA, those fees are paid from the trust fund and are indirectly passed onto the other signatory employers.

(iii) Where the Union utilizes the NLRB processes to make determinations of representation issues,

substantially all of the investigative work, which otherwise might consist of protracted discovery, is conducted by the Board as an administrative matter, with minimum outlays required of the parties in the form of attorneys' fees. Accordingly, shifting the forum of representation matters from the NLRB to the federal courts, whether in the guise of Section 301 actions or ERISA actions, will result in a substantial increase in federal court litigation with concommitant increase in costs for attorneys' fees being borne by all interested parties.

C. THE COURT SHOULD DEFER RULING ON THE ISSUE UNTIL IT CAN BETTER EVALUATE THE IMPACT ON THE NLRB

The decision of the Fifth Circuit in Pratt-Farnsworth, Inc., holds, in substance, that henceforth the

NLRB will not be the exclusive body in deciding representation issues. Rather, that Court holds that federal courts, under Section 301 and under ERISA, may decide representation issues so long as they utilize the same criteria adopted by the NLRB. (Significantly, that Court did not hold that the same statute of limitation would apply). It should require no argument that the decision of the Fifth Circuit, if followed by other Circuits or approved by this Court, would result in a substantial diminution of the NLRB's authority in the representation area. If such a diminution is to be authorized by this Court, it should come in a case in which the NLRB is a party or has been involved. In view of the language of the Fifth Circuit's decision in Pratt-Farnsworth, Inc., it seems inevitable that the federal courts

will be faced with numerous permutations involving the invoking of NLRB procedures along with federal court actions under Section 301 and ERISA. This will require the federal courts to further clarify the myriad of factual possibilities under the Fifth Circuit's rationale. For example, questions which were left unanswered by the Fifth Circuit involved the dismissal of lawsuits, or the staying of lawsuits, where NLRB processes have been invoked either prior to federal court lawsuits or subsequent thereto, and the statute of limitations to be applied. We submit that this Court would be in a better position to analyze the impact of a decision conferring jurisdiction on federal courts to decide representation issues after there has been further developments in the Fifth Circuit and in other Circuits

which Petitioner asserts have adopted the Fifth Circuit's rationale. Once counsel for unions and trust funds have had ample time to take advantage of the rationale of the Pratt-Farnsworth, Inc., case, this Court will be better able to consider the potential impact of approving that rationale. Moreover, the NLRB will be in a better position to evaluate the potential impact of any such ruling on its administrative processes after counsel have had a reasonable opportunity to test the parameters of the rationale of the Fifth Circuit providing for federal court adjudication of representation issues.

D. THIS COURT SHOULD RESOLVE THE ISSUE PRESENTED IN A CASE INVOLVING THE CONSTRUCTION INDUSTRY

As Petitioner candidly notes, virtually all of the NLRB and federal

court litigation involving the courts in representation issues is now centered on the construction industry. If this Court determines to grant certiorari on the issue presented, it should be in a construction case. Only then can the Court work with a record which is appropriate, and be assured of comprehensive briefing. As the Court is aware from news accounts and business reports, the non-Union sector of the construction industry has made enormous gains in market share in the last decade. Many construction unions have attempted to respond by negotiating wages and working conditions which make signatory contractors more competitive. Other unions have responded to the non-union sector by attempting to maintain their wages and working conditions and engaging in picketing, economic action, and litiga-

tion against Union contractors who attempt to establish a subsidiary or affiliate in the non-union sector of the market. Having been unable to persuade Congress or the NLRB to force union signatory employers to maintain only union operations and permit non-union operations to be conducted solely by companies which are unrelated to any union signatory, the unions have now determined to turn to the federal courts in the hope that those courts will be more sympathetic to the union's goals and objectives. We do not believe this Court should enter this arena until more litigation has disclosed the probable impact of permitting forum shopping of representation issues.

E. THE RECORD IN THIS CASE DOES NOT PRESENT ANCILLARY ISSUES WHICH SHOULD BE DETERMINED BY THIS COURT

(i) If this Court should grant certorari and find that federal courts do have jurisdiction to determine representation issues, under either 301 or ERISA, the courts will be presented with significant questions governing laches and the applicable statute of limitations as well as the duty of fair representation. For example, if the establishment of the non-union entity occurred more than six months prior to filing of a complaint, the NLRB would not process an unfair labor practice charge based on such conduct, and would not have to reach any representation issue. If the federal courts, exercising 301 or ERISA jurisdiction, were bound to the same statute of

limitations, the end result would be the same. On the other hand, if the federal courts are free to follow statutes of limitation based upon breach of contract, then a union would be permitted to go back several years and impose its contract on a company and employees which had operated during that interval on the assumption that they had no union contract. Such retroactive liability would constitute a windfall to the trust funds while providing no benefits to the employees of the non-signatory. In fact, those employees would be the ultimate losers because such litigation would undoubtedly result in loss of work and numerous bankruptcies, and become a major source of distability in the construction and other similarly situated industries.

(ii) Permitting the federal courts, either under 301 or ERISA, to determine any and all questions which a union or trust fund might raise in relation to a contract would also involve the federal courts in other areas previously reserved exclusively to the NLRB. For example, when a contract expires by its terms, the employer is still required under federal labor law principles to continue the previous terms and conditions without change until the parties have bargained to impasse. Whether there has been a lawful impasse has traditionally been a decision reserved exclusively to the NLRB through unfair labor practice hearings. However, there are now pending cases where federal district courts are being asked to determine that trust fund obligations continued follow-

ing expiration of the term of the contract, based upon a complaint alleging that the parties had not bargained to a genuine impasse, and where trust funds are using the federal courts to litigate the impasse issue is an effort to avoid the statute of limitations which would apply if the matter were adjudicated before the NLRB. If this Court sustains federal jurisdiction to resolve any and all issues which may be raised by a union or a trust fund and which is alleged to flow from contract enforcement, and permits such litigation to ignore the 10(b) limitation, it will create substantial instability in labor law and will result in a substantial diminution of the power and authority of the NLRB.

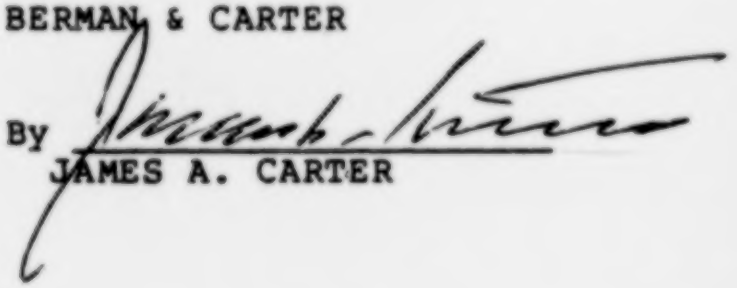
(iii) We do not believe anything in the language or negotiating

history of Section 301 suggests that Congress intended to permit the federal courts, under the guise of enforcement of labor agreements, to usurp and undermine the power and authority of the NLRB. Yet, if this Court grants certiorari at this time on the issue presented in this petition, it will have no way of evaluating the long-term impact of its decision on the NLRB. By declining to grant certiorari in the Pratt-Farnsworth case, the Court permitted the Fifth Circuit to continue with its experiment of permitting the federal courts to hear and determine representation issues. On the other hand, unions in the Ninth Circuit can certainly not argue that there is any urgent or immediate need for change, since the NLRA has been in existence for many years and substantially all unions have

found the processes of the NLRB in representation matters to be adequate for their purposes. It is strongly urged that this Court defer deciding this very important issue until there has been additional development in the District Courts and Courts of Appeal which might be persuasive once this Court does determine to grant certiorari and resolve the issues presented.

Respectfully submitted,

BERMAN & CARTER

By 
JAMES A. CARTER

OPINION

SUPREME COURT OF THE UNITED STATES

BROTHERHOOD OF TEAMSTERS, LOCAL NO. 70 *v.* CALIFORNIA CONSOLIDATORS, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-1755. Decided October 9, 1984

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

In *South Prairie Construction Co.* v. *Operating Engineers*, 425 U. S. 800 (1976) *(per curiam)*, this Court held that a federal court of appeals did not have jurisdiction to decide the appropriateness of a bargaining unit in the first instance, but should have allowed the National Labor Relations Board to make an initial determination. Because two courts of appeals have adopted inconsistent interpretations of *South Prairie*, I dissent from the denial of certiorari.

In *South Prairie*, a union that represented the employees of one company had filed a complaint with the Board contending that its collective-bargaining agreement should cover the employees of a second company because the two companies actually constituted a "single employer" within the National Labor Relations Act. The Board concluded that the two companies were in fact separate employers, and dismissed the complaint. On appeal, the Court of Appeals for the District of Columbia set aside this determination. It then went on to reach and decide a second question, which had not been passed on by the Board: whether the employees of the two companies constituted the appropriate unit under §9 of the Act for purposes of collective bargaining. Section 9 directs the Board to "decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

29 U. S. C. § 159(b). We held that the Court of Appeals had erred when it took upon itself the initial determination of this issue:

> "In foreclosing the Board from the opportunity to determine the appropriate bargaining unit under § 9, the Court of Appeals did not give 'due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution.' *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141 (1940)." 425 U. S., at 806.

In the present case, the Court of Appeals interpreted this language to mean that a federal court is precluded from deciding the appropriateness of a bargaining unit even when the question has never been presented to the Board. The union in this case had proceeded directly into federal court under § 301(a) of the Labor Management Relations Act, 29 U. S. C. § 185(a). It alleged that the company whose employees it represented and another company constituted a "single employer," and sought a declaratory judgment that the second company was bound by the union's collective-bargaining agreement with the first company. The District Court determined that it lacked jurisdiction to adjudicate this complaint. The Court of Appeals held that *South Prairie* necessarily implied that "single employer questions comprise two subsidiary issues": whether two companies constitute a single employer, and whether the employees form a single or appropriate bargaining unit. Section 301 granted district courts jurisdiction to determine the first of these questions, but not the second. The appropriateness of a bargaining unit was a "representational question reserved in the first instance to the Board." 693 F. 2d, at 84. Accordingly, the Court of Appeals remanded to the District Court for an evidentiary hearing on the single employer issue only.

Two days later, a panel of the Court of Appeals for the Fifth Circuit reached a contrary conclusion in a similar case.

Carpenters Local Union No. 1846 v. *Pratt-Farnsworth, Inc.*, 690 F. 2d 489 (CA5 1982), *cert. denied*, —— U. S. —— (1983). The Fifth Circuit read *South Prairie* as being limited to the situation in which two claims are initially presented to the Board and only one of them is decided there. In the Fifth Circuit's view, *South Prairie* did not preclude a federal court with jurisdiction under § 301 from determining whether a bargaining unit is appropriate, where such a determination was necessary to a resolution of the underlying breach of contract issue. Because neither party had petitioned the Board to determine the appropriateness of the bargaining unit in *Pratt-Farnsworth*, the Fifth Circuit remanded the case to the District Court for consideration of the question. The Court of Appeals found support for this disposition in decisions of this Court upholding the jurisdiction of federal courts under § 301 even in the face of the Board's exclusive jurisdiction to consider allegations of unfair labor practices. The bargaining unit issue, the Fifth Circuit concluded, was a "collateral issue" that was essential to the determination of a breach of contract claim under § 301. *Cf. Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616, 626 (1975) (federal courts may decide unfair labor practice questions that emerge as collateral issues under the antitrust laws).

These two decisions are in square conflict. Although the conflict is now limited to two circuits, these circuits are very large circuits indeed, and the issue will surely arise elsewhere. The Eighth Circuit, addressing the narrower question whether a federal court may determine the appropriateness of a bargaining unit under § 301 after the Board has made such a determination in a prior administrative proceeding, has read *South Prairie* broadly, as did the Ninth Circuit in this case. *Local Union 204, International Brotherhood of Electrical Workers* v. *Iowa Electric Light and Power Co.*, 668 F. 2d 413 (CA8 1982). The Eighth Circuit drew the line "between those cases where the district court has jurisdiction

under section 301 and those in which it does not" by "examining the major issues to be decided as to whether they can be characterized as primarily representational or primarily contractual." 668 F. 2d 419. It characterized the determination of an appropriate bargaining unit as a representational question committed to the jurisdiction of the Board.

I would grant certiorari to resolve the conflict between the Fifth and Ninth Circuits, and to avert the wider conflict that will likely arise in the wake of these inconsistent decisions.